



(FAR), 14 CFR Part 91.<sup>2</sup> Nonetheless, the law judge ruled that the 180-day suspension of respondent's airline transport pilot and certified flight instructor certificates contained in the Administrator's order should be waived because respondent filed a timely report of the incident under the provisions of the Aviation Safety Reporting System (ASRP).<sup>3</sup> The sole issue before

---

<sup>2</sup>FAR §§ 91.13(a) and 91.205(a) and (d)(2) provide in pertinent part as follows:

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation.  
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.205 Powered civil aircraft with standard category U.S. airworthiness certificates: Instrument and equipment requirements.

(a) General. Except as provided in paragraphs (c)(3) and (e) of this section, no person may operate a powered civil aircraft with a standard category U.S. airworthiness certificate in any operation described in paragraphs (b) through (f) of this section unless that aircraft contains the instruments and equipment specified in those paragraphs (or FAA-approved equivalents) for that type of operation, and those instruments and items of equipment are in operable condition.

(d) Instrument flight rules. For IFR flight, the following instruments and equipment are required....

(2) Two-way radio communications system and navigational equipment appropriate to the ground facilities to be used.

<sup>3</sup>The ASRP provides that the timely filing of a report with the National Aeronautics and Space Administration (NASA) concerning an incident affecting aviation safety will, in certain instances, result in the waiver of sanction against the airman in any enforcement action which may arise out of such incident. FAA Advisory Circular 00-46C sets forth four criteria for the evaluation of waiver of penalty entitlement, including that the "violation was inadvertent and not deliberate." See Para. 9c.

the Board in this appeal is whether the law judge erred in finding that respondent's conduct was inadvertent and not deliberate so as to warrant a waiver of sanction.<sup>4</sup> For the reasons that follow, we agree with the Administrator that the waiver of sanction was erroneous. We will grant the Administrator's appeal and reinstate sanction.

The facts pertinent to this appeal are largely undisputed. On April 6, 1991, respondent departed in deteriorating weather<sup>5</sup> from Addison Airport, Texas to McKinney Airport, Texas, in civil aircraft N5520D, a Cessna 172.<sup>6</sup> Prior to departure, respondent filed an instrument flight rules (IFR) flight plan to McKinney Airport with air traffic control (ATC). Before issuing the clearance, the controller assigned to the Addison Ground Control/Flight Data/Clearance Delivery (ADSG) positions coordinated respondent's operation over the Blue Ridge VORTAC

---

<sup>4</sup>Respondent has filed a brief in reply, urging the Board to affirm the initial decision and order.

<sup>5</sup>According to the official weather report, the forecast was IFR throughout the relevant area until 1500 UTC. According to the local weather reports, at 1200 UTC Addison was overcast with 7 miles' visibility, at 1247 UTC, it had 5 miles' visibility, at 1347, it had 3 miles' visibility, and at 1447 it had 2 miles' visibility. See Exhibit C-13.

<sup>6</sup>Respondent was accompanied by Carol Ann Adams, whose airman certificate was also ordered suspended by the Administrator (SE-12650). That case was consolidated for hearing with the instant proceeding, but the law judge dismissed the order against respondent Adams. The Administrator has not appealed that ruling.

with the Fort Worth Center. ATC then issued the following clearance:

1333:20     ADSG           Cessna five five two zero deltas cleared to McKinney Airport via after departure turn left heading one zero zero radar vectors to Blue Ridge direct McKinney climb and maintain two thousand expect three thousand one zero minutes after departure frequency will be one two four point three squawk five (unintelligible)

Respondent accepted the clearance. See Administrator's Exhibit C-4, Transcript of ATC Communications (1333:40).

The only authorized instrument approach procedure into McKinney Airport utilizes distance measuring equipment (VOR/DME-A). Respondent admits that aircraft N5520D was not equipped with DME, and he admits that he knew that DME equipment was required to land IFR at McKinney. He claims, however, that he intended to cancel his IFR flight plan if he could not reach the final approach fix under visual flight rules (VFR) and he would then have returned to the alternate destination contained in his flight plan, Addison Airport.

According to respondent, when he arrived at Blue Ridge VORTAC, which is where the VOR/DME-A approach into McKinney begins, the weather was VFR. Respondent then confirmed to the Dallas North Dallas South Combined Radar Positions (DN/DS) that his destination was McKinney Airport. See Administrator's Exhibit C-3, Transcript of communications with Dallas-Fort Worth

ATC, at 1339:46. ATC then issued the following approach clearance:

1342:08 DN/DS Cessna five five two zero delta you're uh approximately twenty miles southwest of the Blue Ridge VOR maintain three thousand until your at the VOR inbound on the approach after the procedure turn three thousand until after the procedure turn and your cleared for the VOR uh alpha I think it is at a McKinney approach.

At 1342:28, respondent accepted the clearance on the VOR/DME-A approach. Id. Twenty-eight minutes later, at 1409:55, respondent canceled his IFR flight plan. Id. According to witnesses on the ground at McKinney Airport,<sup>7</sup> respondent's aircraft was observed descending from the clouds, flying inbound on a heading which coincides with the approach. Respondent then attempted to land the aircraft in the opposite direction of the traffic pattern. The aircraft then ascended and disappeared into clouds, reappeared, and landed. At the time of the landing, the law judge found, the weather conditions were instrument meteorological conditions (IMC).

The law judge sustained the Administrator's allegations, ruling that respondent operated his aircraft on the VOR/DME-A approach without DME equipment before he had canceled his IFR flight plan. However, the law judge, accepting respondent's un rebutted claim that at the time he descended his aircraft towards the final approach fix the weather was still VFR,

---

<sup>7</sup>One of the witnesses is an instrument-rated pilot, an advanced instrument ground instructor, and a certified weather observer. (Exhibit C-6).

concluded that since respondent believed that he could lawfully operate his aircraft VFR on the VOR approach so long as he canceled his IFR flight plan before landing, his violation of the FAR was inadvertent and not deliberate. The law judge appears to have found that respondent's conduct was inadvertent and not deliberate based solely on this credibility finding in favor of respondent. We think that this was error. The law judge should have determined whether respondent's conduct was indicative of a purposeful choice, not whether his conduct evidenced an intent to violate the FAR. In Ferguson v. National Transportation Safety Board, 678 F.2d 821, 828 (9th Cir. 1982), the Ninth Circuit Court of Appeals explained that

...an inadvertent act is one that is not the result of a purposeful choice... a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude.

In his reply brief, respondent, citing the Board's decision in Administrator v. Halbert, NTSB Order No. EA-3628 (1992), argues that he is entitled to sanction waiver because he did not deliberately violate the FAR. We think the facts in Halbert are distinguishable. Halbert believed that he was complying with FAR requirements by landing his aircraft, which had become unairworthy in flight, at what he thought was the safest location to land, when the regulation required that he land at the first location consistent with the safe operation of the aircraft. Thus, we found, Halbert did not deliberately seek to circumvent

the applicable regulation. Id. at 8. In the instant case, when respondent's operation is viewed from the moment of departure to the moment of landing it is apparent that his conduct was a result not of his mistaken understanding of the FAR requirements, but because of his purposeful attempt to circumvent those requirements. Respondent accepted an IFR clearance when he did not have the proper equipment to land IFR at his destination.<sup>8</sup> Moreover, he accepted radar vectors from ATC and actually operated IFR on the VOR approach for 28 minutes, before he canceled his IFR flight plan.<sup>9</sup> These actions were deliberate. He is not entitled to immunity under the provisions of the ASRP.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The initial decision is reversed as to the issue of sanction and the Administrator's order is affirmed in its entirety; and
3. The 180-day suspension of respondent's airman certificates shall begin 30 days after service of this order.<sup>10</sup>

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

---

<sup>8</sup>Respondent's post hoc rationalization that he could have returned to Addison if the weather was IFR when he reached Blue Ridge is unconvincing, since he knew or should have known that the weather at Addison was deteriorating rapidly.

<sup>9</sup>The fact that the weather may have been VFR at the time is irrelevant.

<sup>10</sup>For purposes of this order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).